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APPENDIX - PART II

Supreme Court, U.S.
FILED

IN THE **94127** JUL 20 1994

SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK

_____ Term, 1994

No. _____

GLENN D. THESENVITZ, et al,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES

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APPENDIX G
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIMMIE L. WATKINS, WANDA WATKINS, husband and wife, Plaintiffs-Appellees-Cross-Appellants, vs. WESTINGHOUSE HANFORD COMPANY, a Washington Corporation, et al., Defendants-Appellants-Cross-Appellees	)	Nos. 91-36195 91-36233 D.C. No. CV-90-0135-JLQ OPINION

Appeal from the United States District Court for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
November 1, 1993--Seattle, Washington

Filed December 29, 1993

Before: Thomas Tang, Jerome Farris, and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer

SUMMARY

Labor and Employment/Pensions/ERISA

The court of appeals affirmed in part and reversed in part a district court judgment. The court held that the Employee Retirement Income Security Act (ERISA) does not sanction a pension plan participant's recovery of benefits-related damages on an equitable estoppel theory.

From July 1, 1974 until July 14, 1981, appellee Jimmie Watkins worked for appellant Westinghouse Hanford Co. (WHC), a private contractor working at the Hanford Nuclear Reservation (HNR). He obtained vested rights to accrued pension benefits under WHC's pension plan (the Westinghouse Plan). From August 1, 1981 until June 28, 1987, Watkins worked for appellant Rockwell Hanford Operations, another private contractor working at

HNR. He participated in Rockwell's plan, which gave him no credit for his time with WHC. Watkins had no vested rights in accrued pension benefits under the Rockwell Plan.

The Department of Energy consolidated the primary responsibility for HNR's daily operations with WHC, effective June 29, 1987. On June 29, 1987, Watkins again became a WHC employee. WHC determined that the assets of the private contractors' pension plans should be merged into a single, site-wide pension plan, the WHC's Operating and Engineering Pension Plan (HOEP Plan), under which the benefits paid out would depend upon the employee's number of years of "credited service."

WHC announced a Voluntary Reduction in Force Program (VRF Program), under which employees who retired early would be entitled to receive pension benefits

prior to the usual retirement age. By letter dated November 12, 1987, WHC informed Watkins that if he chose early retirement, all of his prior service at HNR would be combined, both for vesting and benefit-computation purposes. Watkins decided to retire early and participate in the VRF Program effective January 1, 1988. He began receiving HOEP Plan monthly pension benefits calculated using all of his preconsolidation service at HNR.

As of August 1, 1988, the HOEP Plan's Administrative Committee determined that the HOEP Plan's express provisions recognized prior service only to the extent that prior service was recognized under the pension plan of the employer for which the employee worked immediately prior to the consolidation.

Watkins elected to participate in a new Special Voluntary Retirement Program

(SVR Program), and began receiving enhanced monthly pension benefit payments.

A Committee member notified Watkins that his HOEP benefits had been calculated erroneously to include his preconsolidation years with WHC, and his monthly payments under the HOEP Plan would be reduced to reflect the fact that his initial WHC years did not count as "credited service." The Committee denied Watkins' appeal of the recalculation of his pension benefits.

Watkins and his wife sued WHC, alleging, among other things, that WHC was estopped to change his original benefits calculation, and failed to interpret the HOEP Plan in accordance with its express provisions. The district court ruled in the Watkinses' favor on the estoppel claim, but in WHC's favor on the remaining claims.

The Watkinses appealed, contending that WHC was obliged to restore and aggregate Watkins's prior service with WHC for purposes of calculating his HOEP Plan benefits. The Watkinses argued that 1) WHC's November 12, 1987 letter established an ERISA plan, 2) the Westinghouse Plan and the Rockwell Plan were merged into and continued as part of the HOEP Plan, and 3) the HOEP Plan itself required aggregation of all of his preconsolidation serve at HNR because Watkins had "credited service" under the HOEP Plan by reason of his prior WHC service. WHC appealed the judgment in favor of the Watkinses on the estoppel claim.

[1] The letters WHC wrote to Watkins contained none of the details about beneficiaries, source of financing, or procedures for paying and administering benefits that were

necessary to create an ERISA plan. Moreover, the letter was not the only writing that had anything to do with Watkins's retirement; there were summary booklets anticipating the HOEP Plan and a detailed, comprehensive written plan.

[2] The fact that the Westinghouse Plan was "merged into and maintained" as part of the HOEP Plan did not indicate that the terms of the predecessor plans were to be integrated into the HOEP Plan.

[3] Thus, the HOEP Plan became the some document to which reference should be made in determining postconsolidation pension benefits.

[4] Because the Rockwell Plan gave no credit for WHC service, Watkins's prior WHC service could not be included in "credited service" for purposes of applying the HOEP Plan's benefits formula.

[5] The HOEP Plan was reasonably

construed to mean that Watkins had accrued benefits under the Westinghouse Plan, and that Watkins's prior service would be credited for purposes of vesting but not for purposes of the formula to be applied.

[6] The Watkinses' equitable estoppel claim had no merit in light of the Supreme Court's recent decision in Mertens v. Hewitt Associates.

[7] The Court held that the term "other appropriate equitable relief" in a statute authorizing civil actions by plan participants encompassed only an injunction, mandamus, or restitution. A reading of the statute to provide authority for the Watkinses' equitable estoppel claim was untenable.

[8] ERISA did not sanction the recovery of damages the district court held, and therefore, the judgment in the Watkinses' favor must be reversed.

COUNSEL

Darryl D. Jonson, Cowan, Walker, Jonson, Moore, Nickola & Heye, Richland, Washington, for the plaintiffs-appellees-cross-appellants.

Marvin L. Gray, Jr., Davis Wright Tremaine, Seattle, Washington, for the defendants-appellants-cross-appellees.

OPINION

RYMER, Circuit Judge:

This is our second trip through the thicket of pension plans at the Hanford Nuclear Reservation (HNR). In Carver v. Westinghouse Hanford Co., 951 F.2d 1083, (9th Cir. 1991), cert. denied 112 S.Ct. 3036 (1992), we considered whether Westinghouse Hanford Company (WHC)'s Operating and Engineering Pension Plan (HOEP Plan), adopted after the consolidation of HNR's operations, improperly failed to recognize prior service for other contractors at HNC. We

held that the operative plan was the formal plan adopted in December 1987, and that ERISA does not require WHC to take the years of service accrued for predecessor employers onto its pension plan for purposes of calculating benefits. We also suggested that if 'WHC had made knowing false representations or concealments of material facts, it might be equitably estopped from interpreting the plan in a manner which does not give HNR employees credit for the time they believe they deserve. Id. at 1087-88. It is principally this issue -- whether WHC can be equitably estopped on account of misrepresentations it made to plaintiff Jimmie Watkins about aggregating prior service and thereby be required to pay benefits promised but not paid -- that we must resolve in this appeal.

Following a stipulated facts trial,

the district court dismissed the Watkinses' claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, but found that WHC had knowingly misrepresented that all of the Watkins's HNR service would be included in the calculation of his benefits. It found that all other elements of estoppel had been established and that the Watkinses were entitled to recover from WHC a lump sum reflecting past benefits promises but not received, as well as the present value of unpaid future benefits promised by WHC but not being paid under the HOEP Plan.

Both parties appeal. As the Supreme Court has recently held, equitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. § 1132(a)(3), which the district court cited as

statutory authority for the Watkinses' equitable estoppel claim. Mertens v. Hewitt Assocs., 113 S.Ct. 2063 (1993). We have also recently held that an estoppel claim cannot result in an payment of benefits that would be inconsistent with the written plan. Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 822 (9th Cir. 1992). As this is the effect of the relief in this case, that part of the district court's judgment cannot stand. We have jurisdiction, 28 U.S.C. § 1291, and we accordingly reverse that part of the judgment which awards damages on the Watkinses' claim for equitable estoppel. We affirm the district court's judgment on the Watkinses' ERISA claims and deny their request for attorney's fees on appeal.

I.

Since the end of World War II, the

United States Department of Energy (DOE) and its predecessors have operated the Hanford Nuclear Reservation in Benton County, Washington. A series of private contractors have performed work on HNR. Because changes in job functions did not always coincide with changes in private contracts, the common practice at HNR was for successor contractors to employ individuals who had worked to a predecessor contractor. The employees would perform essentially the same work at HNR; they would, however, work for a different employer.

Almost all of the private contractors had their own pension plans. This was true of the two contractors that employed Jimmie Watkins during his time at HNR: WHC and Rockwell Hanford Operations (Rockwell). Watkins worked for WHC from July 1, 1974 until July 14, 1981; during that time, Watkins obtained

vested rights to accrued pension benefits under the Westinghouse Hanford Company Pension Plan (Westinghouse Plan). From August 1, 1981 until June 28, 1987, Watkins was a Rockwell employee and a participant in the Rockwell Hanford Operations Plan (Rockwell Plan). The Rockwell Plan gave Watkins no credit for his time with WHC; consequently, Watkins obtained no vested rights in accrued pension benefits under the Rockwell Plan.

In 1986, DOE decided to consolidate the primary responsibility for HNR's daily operations with one private contractor, WHC, effective June 29, 1987. On that date, Watkins was "terminated by transfer" from Rockwell to WHC, and he again became a WHC employee.

Prior to the consolidation, WHC determined that the assets of the private contractors' pension plans should be merged into a single, site-wide pension

plan, the HOEP Plan. The HOEP Plan was a "High Five" Plan -- one in which the benefits paid out would equal a percentage of the employee's compensation over her or his highest five compensation years times the number of years of "credited service". A major issue during the reorganization was whether an employee would receive recognition under the HOEP Plan for all of his or her years of service at HNR under all the various contractors. Because it took time to negotiate, the final HOEP Plan wasn't adopted until December 30, 1987. It was made retroactive to the June 29, 1987 consolidation date.

Soon after the consolidation, WHC announced a Voluntary Reduction in Force Program (VRF Program) for all eligible employees, including Watkins. Under the VRF Program, an employee who retired early would be entitled to receive

pension benefits prior to the usual retirement age.

On October 28, 1987, Watkins wrote to WHC, requesting a calculation of his pension benefits in the event he chose to participate in the VRF Program. In particular, Watkins wanted to know whether his initial time with WHC and his time with Rockwell would be combined for purposes of computing his benefits.

By letter dated November 12, 1987, WHC informed Watkins that if he chose early retirement, all of his prior service at HNR would be combined, both for vesting and benefits-computation purposes. At the time, however, no one at WHC and no one on the Plan's Administrative Committee (Committee), the Plan's administrator, knew whether the HOEP Plan would provide for the computation of benefits based on the aggregation of all preconsolidation and

postconsolidation service at HNR. WHC did not inform Watkins of this uncertainty. The district could find that neither WHC nor any of its employees "in bad faith, deliberately tried to mislead" Watkins in connection with this letter. Rather, the district court found "that the misrepresentations were due to some type of misunderstanding, miscommunication, or misinterpretation of the pending" HOEP Plan's provisions.

After he received this letter, Watkins decided to retire early from his $52,000-per-year job and participate in the VRF Program effective January 1, 1988. On that date, Watkins received $8,030.80 in separation pay and began to receive HOEP Plan monthly pension benefits of $657.14; the calculation of Watkins's monthly benefits included all of his preconsolidation service at HNR.

On May 10, 1988, WHC announced

another round of workforce reduction programs, including the Special Voluntary Retirement Program (SVR Program). The SVR Program offered eligible employees an additional three years of age and three years of service for purposes of computing pension benefits, as well as an additional $250 monthly "bridge" payment until the age of Social Security eligibility. WHC made the SVR Program available to former employees, including Watkins, who participated in the VRF Program, provided those employees would refund to WHC the amount they received in separation pay.

On August 1, 1988, WHC informed Watkins that if he were to participate in the SVR Program, his new monthly benefits would total $1,023.93, exclusive of the $250 "bridge" payment. WHC continued to include Watkins's preconsolidation service with WHC and Rockwell in its

calculation of monthly benefits. As of August 1, 1988, however, the Committee had determined that the HOEP Plan's express provisions recognized prior service only to the extent that prior service was recognized under the pension plan of the employer for which the employee worked immediately prior to the consolidation. As of the same date, at least one Committee member, Michael Byrd, WHC's Pensions & Savings Investments Manager, was aware that Watkins's monthly benefits were computed based on all of his preconsolidation HNR service, in contravention of the HOEP Plan. However, Byrd took no action at the time to correct the situation. The district court found this was a knowing misrepresentation.

On August 29, 1988, Watkins elected to participate in the SVR Program and refunded the $8,030.80 he had received in

separation pay. He then began receiving enhanced monthly pension benefit payments.

On May 17, 1989, Byrd notified Watkins that his HOEP benefits had been calculated erroneously to include his preconsolidation years with WHC (1974 through 1981). Byrd informed Watkins that, although his monthly payments would include $213.51 annuity payable under the Westinghouse Plan, Watkins's monthly payments under the HOEP Plan would be reduced to reflect the fact this his initial WHC years did not count as "credited service." Watkins never was asked to refund (and he never has refunded) any HOEP Plan benefits he received prior to May 17, 1989.

Watkins appealed the recalculation of his pension benefits to the Committee. On August 3, 1989, the Committee denied the appeal. Watkins then filed this

lawsuit, alleging WHC was estopped to change Watkins's original benefit calculation; WHC had failed to interpret the Plan in accordance with ERISA; and WHC had failed to interpret the plan in accordance with its express provisions.

The district court rule din the Watkinses' favor on the remaining claims for relief. It held that the HOEP Plan, as it was finally adopted and amended, was the "sole document to be interpreted." Applying a heightened standard of review, the court concluded the Watkinses had failed to establish that WHC incorrectly denied paying Watkins's claim for benefits.

II

On their appeal, the Watkinses argue that WHC and the district court erred because WHC's November 12, 1987 letter established an ERISA plan. They also argue that the Westinghouse Plan and the

Rockwell Plan were merged into and continued as part of the HOEP Plan. As a result, they contend, WHC was obliged either as successor employer to Rockwell under the old Westinghouse Plan to restore and aggregate Watkins's prior service with WHC for purposes of calculating HOEP Plan benefits as well as for vesting, accrual, and other purposes. Further, assuming that the operative plan is comprises of the November 12, 1987 letter, the Westinghouse document, the Rockwell Plan document, and the HOEP document, the Watkinses contend that the Committee abused its discretion in two respects: first, by decreasing Watkins's pension in May, 1989 -- and retroactively ending accrual of benefits under the Westinghouse and Rockwell Plans as of the date of consolidation -- without the formal action which is required for plan amendments; and second, by changing its

interpretation of the plan so as to disregard non-contiguous credited service prior to consolidation in the calculation of pension benefits. Alternatively, the Watkinses argue that the HOEP Plan itself requires calculation of early retirement allowances on the basis of "credited service", which in their view includes prior service for Westinghouse. Finally, they argue that to deny pre-break benefits as the Committee did contravenes ERISA because 29 U.S.C. § 1060 requires aggregation of pre-break and post-break service.

WHC responds that the district court correctly found that the HOEP Plan document is the only applicable plan. Under the HOEP Plan, benefits depend on the years of credited service determined in accordance with the plan of the employer for which the participant last worked -- Rockwell, in Watkins's case.

Because the Rockwell Plan gives no credit for Westinghouse service, Watkins's 1974-1981 Westinghouse service may not be included for purposes of applying the HOEP final pay formula. However, WHC notes, the old Westinghouse and Rockwell Plans remain in effect for purposes of paying benefits accrued under them. Thus, Watkins continues to receive vested benefits under the old Westinghouse Plan based on its "career average" formula; and he continues to receive benefits for his Rockwell and postconsolidation service under the HOEP Plan formula. For this reason, WHC contends, there was no "decrease" in benefits and the damages awarded amount to a windfall to Watkins.

A

Much of the Watkinses' appeal on their ERISA claims follows from Carver, which involved a group of employees who, like Watkins, thought the HOEP Plan

improperly failed to credit all of their preconsolidation service at HNR. Carver held that the interim plan descriptions did not establish a plan and that there was no HOEP Plan until December, 1987 when it was formally adopted. We also read the preliminary summary booklets as being consistent with the HOEP Plan itself, providing that no credit for benefit purposes would be given for prior years of HNR service unless such service would have been recognized by the plan in which the employee participated immediately before consolidation.

[1] The Watkinses try to distinguish their case from Carver because of their personal exchange of correspondence with WHC, and urge us to follow the Eleventh Circuit's decision in Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991), which held that a letter to the company's longtime general manager

outlining the benefits and procedures to be followed in connection with his requirement created an ERISA plan. Id. at 1544-45. We need not decide whether to embrace Williams, however, because the letters WHC wrote Watkins contain none of the details about beneficiaries, source of financing, or procedures for paying and administering benefits that are necessary to create an ERISA plan.[1] See Carver, 951 F.2d at 1086. The November 12, 1987 letter simply informed Watkins, incorrectly, that if he chose early retirement under the VRF Program all his prior service at HNR would be combined

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[1]ERISA requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Each such plan must (1) provide a policy and a method for funding the plan, (2) describe a procedure for plan operation and administration, (3) provide a procedure for amending the plan, and (4) specify a basis for payments to and from the plan. Id. § 1102(b).

for vesting and benefits-calculation purposes. Nor was that letter the only writing that had anything to do with Watkins's retirement, as was the case with the employee in Williams; there were summary booklets anticipating the HOEP Plan and eventually, a detailed, comprehensive written plan. Even though the correspondence turned out to be inconsistent with the Plan ultimately adopted (unlike the summary booklets in Carver which were consistent with the HOEP Plan), the fact that the letters were mistaken cannot on that account alone create an ERISA plan. Otherwise, every communication about prospective benefits could create a unique plan for a single participant who is not differently situated from fellow employees for whom the plan is established. Such a result would run counter to ERISA's overriding interest in avoiding side agreements that

deviate from a plan applicable to all employees. See, e.g., Rodrigue v. Western & S. Life Ins. Co., 948 F.2d 969, 971 (5th Cir. 1991) (ERISA's writing, requirement protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to them under the express terms of the plan."). Finally, as we said in Carver, "'it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative.'" 951 F.2d at 1087 (quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)). In Watkins's case as in the case of the HNR employees in Carver, "[t]he plan simply was not a reality until that December [1987] when it was formally adopted." Id.

The Watkinses argue another point not specifically addressed in Carver,

that the HOEP Plan, by its express terms, adopts and incorporates both the Westinghouse Plan and the Rockwell Plan which together require that Watkins's HOEP benefits be based on all his previous periods of service. Their first argument, that the Rockwell Plan requires aggregation of service because Watkins was "terminated for transfer" fails because Watkins did not "transfer" to Rockwell from Westinghouse; his employment at Westinghouse was terminated. The Watkinses' more compelling argument is that the Westinghouse Plan was merged into and maintained as part of this, or about the fact that the HOEP Plan Preamble provides that, as of the effective date, June 29, 1987, "each Predecessor Employer [Rockwell, in Watkins's case] ceased its employment of the Eligible Employees and they became employed by [WHC].

Westinghouse Hanford Company became successor employer under the Predecessor Plans of the Predecessor Employers and the assets of the Predecessor Plans were merged into the Plan." The parties disagree, however, about what these facts signify.

[2] The Watkinses argue that because the Westinghouse Plan was maintained as part of the HOEP Plan, it stayed alive in all respects including its provision that for vested employees, service prior to a break in service is restored upon the date of reemployment with WHC for purposes of vesting, benefit accrual, and calculating and paying benefits. Neither the fact that the Westinghouse Plan was "merged into and maintained" as part of the HOEP Plan nor the language relied upon in the Preamble, however, indicates that the terms of the Predecessor Plans were to be integrated

into the HOEP Plan; rather, WHC was to succeed to the status of employer under those plans so that it could assume responsibility for administering the existing pension funds and see to it that vested benefits under previous plans continue to be paid. To that end, the assets of Predecessor Plans -- money held in trust to pay accrued benefits -- were merged into the HOEP Plan.

[3] Accordingly, we see no reason to depart from Carver's conclusion or to disagree with the district court that there was no "interim plan" and that the only applicable plan is the HOEP Plan adopted in December, 1987. The district court correctly held that the HOEP Plan became the sole document to which reference should be made in determining postconsolidation pension benefits.

B

The Watkinses next argue that the

HOEP Plan itself requires aggregation of all of Watkins's preconsolidation service at HNR. they start from the premise that Watkins had "credited service" under the HOEP Plan by reason of his prior WHC service. Since Watkins had a nonforfeitable right to an accrued benefit as of consolidation and as of the date of his retirement, they contend that Article 4.2 of the HOEP Plan requires payment of an early retirement allowance based on that "credited service."[2] In

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[2] Article 4.2, entitled "Early Retirement Allowance," provides as follows:

> A participant who has attained age 55 and received credit for 10 years of Service under Article 6 shall be entitled to retire upon any first day of the month following his 55th birthday, which day shall be his Early Retirement Allowance. A Participant's Early Retirement Allowance shall be equal to his Accrued Benefit reduced one-half of one percent (1/2%) per month for each month

(continued...)

their view, crediting of prior service with Westinghouse and Rockwell for benefit calculation purposes is required, as the HOEP Plan "High Five" determination makes no distinction between compensation received before and after consolidation.

[4] WHC counters that the benefit formula in Article 4.1 of the HOEP Plan is based on "years of credited service," which Article 3.2(a) requires be determined in accordance with the plan of

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[2](...continued)
his Early Retirement Date is earlier than age 62. Effective January 1, 1988, the reference in the foregoing sentence to age 62 shall be changed to age 60. If a Participant elects to leave the employ of an Employer after attaining age 62 with not less than 10 Years of Service, credited under Article 6 he may elect early retirement and his Early Retirement Allowance shall be equal to his Accrued Benefit. Effective January 1, 1988, the reference in the foregoing sentence to age 62 shall be changed to age 60.

the employer for which the participant last worked -- i.e., Rockwell. Because the Rockwell Plan gave no credit for Westinghouse service, WHC contends that Watkins's prior Westinghouse service may not be included in "credited service" for purposes of applying the HOEP "High Five" formula. We agree.

1

When reviewing an administrator's interpretation of an ERISA plan, we apply de novo review "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Dytrt v. Mountain State Tel. & Tel. Co., 921 F.2d 889, 894 (9th Cir. 1990). When such discretion exists, the arbitrary and capricious standard applies. Dytrt, 921 F.2d at 894. "[I]f

a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." Firestone, 489 U.S. at 115 (internal quotation marks and alteration omitted); see also Bogue v. Ampex Corp., 976 F.2d 1319, 1325 N.29 (9th Cir. 1992) ("Because the great deference accorded a plan administrator arises in part from the assumption of trust law that the trustee has no pecuniary interest in his decisions, proof that the trustee does have such interest correspondingly strengthens the court's level of review."), cert. denied, 113 S.Ct. 1847 (1993).

The HOEP Plan delegates to the Committee the discretionary authority to interpret the Plan's provisions. However, the district court properly

reviewed the Committee's interpretation under heightened scrutiny, since almost all the Committee members are WHC management employees. Firestone, 489 U.S. at 115.

In addition, the Watkinses submit that no deference is due to the Committee's decision because that decision was mandated by DOE. We do not need to resolve this issue, however, because the record does not support the Watkinses' argument. Although it is undisputed that WHC disagreed with DOE during the consolidation negotiations in 1987 about how the post-consolidation plan should calculate "credited service", once the HOEP Plan was adopted, there is no evidence that DOE influenced the Committee's interpretation of the plan when it determined Watkins's benefits in 1989. In any event, no matter whether the Committee's determination is reviewed

de novo or with some deference (factoring in the conflict of interest under which it was operating), we agree with its interpretation.

2

The Watkinses' position turns on the HOEP Plan provisions that define "credited service." Article 1.6 defines "credited service" as "service credited pursuant to Article 3." Article 3.2, in turn, provides in pertinent part:

> Credited Service prior to the Effective Date will be given in accordance with the following rules:
>
> (a) A Participant in the employ of an Employer on the Effective Date will receive credit hereunder for service prior to the Effective Date pursuant to the rules of the Predecessor Plan of the employer for which he last worked. . .

(Emphasis added.) We agree with the district court that the phrase "employer for which he last worked" is properly

interpreted in Watkins's case to be Rockwell. It is undisputed that the Rockwell Plan gave Watkins no credit, either for benefits-calculation or vesting purposes, for his prior service at Westinghouse. The parties also agree that Watkins had a nonforfeitable accrued benefit on June 29, 1987, by reason of his prior period of service with WHC.

[5] Based on these facts, the Watkinses suggest a number of different reasons why the Committee's interpretation conflicts with the HOEP Plan, but all of these reasons boil down to the point that the "credited service" and "accrued benefit" provisions pick up prior service for purposes of calculating benefits. The Watkinses' bottom line is that pre-break-in-service work for Westinghouse must be put together with postconsolidation service such that all benefits are "accrued" under the HOEP

Plan formula instead of partly under the old Westinghouse Plan "career average" formula (for Watkins's 1974-1981 Westinghouse service) and partly under the new HOEP "High Five" formula (for postconsolidation WHC service). We agree with the district court that the HOEP Plan was not misinterpreted by the Committee. The HOEP plan is reasonably construed to mean that Watkins had accrued benefits under the Westinghouse Plan (a fact WHC never has contested), and that Watkins's prior service would be credited for purposes of vesting but not for purposes of the formula to be applied.

Finally the Watkinses submit that the Committee erred by choosing an interpretation that favors the Plan, instead of the one urged by Watkins that was favorable to him, because a plan administrator is required to act in the

best interest of participants.. This argument is unavailing as the Watkinses' interpretation depends on the existence of an "interim plan" or a plan which consists of the November 12, 1987 letter, the Westinghouse Plan, the Rockwell Plan, and the HOEP Plan, which we have already held is not the case.

C

The Watkinses finally contend that the Committee's interpretation of the HOEP Plan as now allowing aggregation of Watkinses's preconsolidation service violates a number of ERISA provisions, particularly its notice and break-in-service rules. They complain that the HOEP Plan reduced accrued benefits under the Westinghouse and Rockwell Plans because it retroactively ended accrual of benefits under those plan as of June 28, 1987, without complying with ERISA's amendment procedures. The Watkinses also

argue that under ERISA, once an employee has achieved any percentage of vesting, all of his pre-break and post-break service must be aggregated for all purposes. This latter argument is foreclosed by Carver, where we held that there is nothing in ERISA relating to the amount of benefits to be calculated into a plan formula. 951 F.2d at 1088. The Watkinses's other arguments are also unavailing, given our conclusion that there was no "interim plan" and that the Westinghouse and rockwell plans were not part of the HOEP Plan for any purpose other than administering previously accrued and vested benefits. There was, accordingly, no amendment.

Section 1054(g)(1) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8)

... of this title."[3] Section 1082(c)(8), in turn, requires that notice of the proposed amendment be given to the Secretary of Labor, and that the Secretary either approve or, within 90 days, fail to disapprove the amendment.

It is undisputed that notice of the Watkins benefit decision was not given to the Secretary of Labor. The Watkinses argue that the decision therefore violated ERISA, as it was an "amendment" that decreased Watkins's "accrued benefit." But an "accrued benefit could have been "decreased" only if the Westinghouse Plan (which aggregates all Westinghouse service) is the operative postconsolidation plan document and if the HOEP Plan's "High Five" formula springs backward to merge Watkins's 1974-

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[3] Section 1054(g)(1) also requires compliance with 29 U.S.C. § 1441. Section 1441 deals with terminated plans and does not apply in this case.

1981 Westinghouse service into his postconsolidation WHC service so as to make benefits for the entire period of Westinghouse service accrue at the HOEP Plan formula level. That simply isn't what happened.

Watkins's benefits under the Westinghouse Plan for his initial period of service have not been reduced. They were calculate under the "career average" formula of that Plan. Watkins's post-June 29, 1987 benefits were calculated under the HOEP Plan and its "High Five" formula. As we have held, the Westinghouse Plan did not merge into the HOEP Plan and require linkage of service at the higher HOEP rate.

The Watkinses also argue that the Committee violated 29 U.S.C. § 1054 by changing the interpretation of what qualified as "credited service" under the Plan. Again, this argument fails because

the Committee never reduced any of the benefits Watkins already had accrued. The changed interpretation did result in lower monthly benefit payments, but only for future payments. This does not run afoul of ERISA.

While ERISA sets forth strict guidelines on rights that may not be forfeited (i.e., vested rights) and benefits that may not be decreased (i.e., accrued benefits), "courts have uniformly relied on Alessi [v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511-14 (1981),] to uphold the formulas by which employers compute the amount of their employees' benefits, so long as the pension plans in question satisfy ERISA's guidelines." Williams v. Caterpillar, Inc., 944 F.2d 658, 664 (9th Cir. 1991). Because the Committee's interpretation did not take away benefits Watkins had accrued, the Committee's actions did not violate §

1054.[4].

The Watkinses cite no authority for their claim that ERISA requires that WHC aggregate all of Watkins's preconsolidation service for purposes of calculating his benefits. Instead, they rely on a single sentence from the House Conference Report that accompanied ERISA: "[O]nce an employee has achieved any percentage of vesting, then all of his pre-break and post-break service must be aggregated for all purposes." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 14 reprinted in 1974 U.S.C.C.A.N. 5038, 5051. Their reliance is misplaced, however, as the ERISA section that comes closest to embodying the "rule" described in the House Conference Report is 29 U.S.C. § 1060 --

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[4] For these same reasons, the Watkinses' arguments based on Article 19 of the HOEP Plan and § 8.1 of the Westinghouse Plan, both of which prohibit amendments that reduce an employee's accrued benefits, are without merit.

and it does not require aggregation for purposes of calculating benefits.

Section 1060 provides in pertinent part:

> For purposes of this part [2] and part 3 [of ERISA] --
>
> > (1) In any case in which the employer maintains a plan of a predecessor employer, service of such predecessor shall be treated as service for the employer . . .

29 U.S.C. § 1060(b)(1). This rule of aggregation applies only to parts 2 and 3 of ERISA, Id. §§ 1051-1086. As we said in Carver, these parts of ERISA "establish minimum requirements for participation, vesting, funding, and rate of accrual of benefits. There is nothing in these provisions relating to the amount of benefits to be calculated into the plan formula" 951 F.2d at 1088 (citations omitted).

The HOEP Plan's eligibility

provision, Article 2.2(c), aggregates all preconsolidation service, thereby complying with § 1060(b)(1). Carver makes it clear that § 1060 does not mandate that the plan calculate benefits based on complete aggregation of service. The district court properly rejected the Watkinses' ERISA claims.

III

[6] We turn now to WHC's appeal and the Watkinses' cross-appeal of the district court's equitable estoppel rulings. The district court held for the Watkinses on their equitable estoppel rulings. The district court held for the Watkinses on their equitable estoppel claim against WHC, but not against the Plan. WHC argues that the Watkinses' equitable estoppel claim has no merit in light of the Supreme Court's recent decision in Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993). We agree.

Before Mertens, we had said that "[e]ven though ERISA preempts common law theories of contract law, the principles of equitable estoppel apply to pension plans." Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986) (citation omitted); see also Carver, 951 F.2d at 1087-88; Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985). At the same time, we have limited the circumstances in which an ERISA claimant may assert an equitable estoppel claim. In Davidian v. Southern California Meat Cutters Union & Food Employees Benefit Fund, 859 F.2d 134 (9th Cir. 1988), we held that an estoppel claim will not lie against a trust fund where recovery on the claim would contradict written plan provisions. Id. at 136. And in Greany v. Western Farm Bureau Life Insurance Co., 973 F.2d 812 (9th Cir. 1992), we held that "a federal

common law claim of equitable estoppel will be available only where '(a) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (b) representations are made to the employee involving an oral interpretation of the plan'" Id. at 821 (emphasis added) (quoting Kane v. Aetna Life Ins., 893 F.2d 1283, 1286-87 (11th Cir.), cert. denied, 498 U.S. 890 (1990).

[7] In Mertens, the Court considered whether a non-fiduciary who knowingly participates in the breach of a fiduciary duty under ERISA can be liable for losses that a plan suffers as a result. The Court first reviewed the remedies available under § 1109(a) against fiduciaries (which WHC is in this case):

> [T]he fiduciary is personally liable for damages ("to make good to [the] plan any losses

> to the plan resulting from each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of asserts of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate."

113 S. Ct. at 2066 (second and third alterations in original) (quoting 29 U.S.C. § 1109(a)). Because the party from whom money damages was sought in Mertens was not a fiduciary, however, the claimant sought to premise relief on § 1132(a)(3), which authorizes a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan." 29 U.S.C. § 1132(a)(3). This required the Court to

interpret "appropriate equitable relief" and to decide whether it encompasses compensatory damages. The Court held that the term "other appropriate equitable relief" encompasses only the traditional forms of equitable relief, i.e., an injunction, mandamus, or restitution. 113 S. Ct. at 2068-70. The district court in this case believed that § 1132(a)(3) provides the statutory authority of the Watkinses' equitable estoppel claim. After Mertens, such a reading is untenable.[5]

Mertens requires the Watkinses to

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[5] It makes no difference that the Watkinses' claim is equitable in nature. The Court in Mertens looked to the substance of the remedy sought (i.e., injunction versus damages) rather than the label placed on that remedy. See 113 S. Ct. at 2068 ("Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages -- monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties.").

identify one of ERISA's six civil enforcement provisions that authorizes the recovery of damages on their equitable estoppel claim. They firs argue that § 1132(a)(1) provides the statutory authority. Section 1132(a)(B) authorizes actions by participants or beneficiaries "to recover benefits due ... under the terms of [the] plan, to enforce ... rights under the terms of the plan, or to clarify ... rights to future benefits under the terms of the plan[.]"[6] (Emphasis added.) However, the Watkinses' equitable estoppel claim does not seek to recover benefits "under the terms of the" HOEP Plan; rather, their theory requires the terms of the HOEP Plan to be ignored in favor of the

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[6] Section 1132(a)(1)(A) provides for an enforcement action against administrators who refuse to comply with requests for information that ERISA requires administrators to supply.

representation made to Watkins.

Section 1132(a)(2) authorizes a civil action by "a participant . . . for appropriate relief under § 1109[.]" Section 1109, in turn, "makes fiduciaries liable for breach of [their] duties, and specifies the remedies available against them[,]" including damages. Mertens, 113 S. Ct. at 2066. But § 1132(a)(2) does not provide the authority for the Watkinses' equitable estoppel claim, since § 1108 only allows recovery that "inures to the benefit of the plan as a whole." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985)1 see also id. at 144 ("[T]he entire text of [§ 1109] persuades us that Congress did not intend that section to authorize any relief except of the plan itself.").

[8] Nor do ERISA's three remaining civil enforcement provisions plainly authorize the recovery of damages on the

Watkinses' equitable estoppel claim.[7] Therefore, because ERISA does not sanction the recovery of damages as the district court held, we must reverse the judgment in the Watkinses' favor.[8]

IV

The Watkinses ask for their attorney's fees on appeal pursuant to 29 U.S.C. § 1132(g)(1). This section "allows for the recovery of attorney's fees and costs incurred in an appeal regardless of the outcome." Oster v. Barco of Cal. Employees' Retirement Plan,

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[7] Section 1132(a)(4) authorizes a suit for violation of § 1025(c), which mandates that plan administrators furnish participants with certain information contained in Internal Revenue registration statements. Sections 1132(a)(5) and (a)(6) authorize actions only by the Secretary of Labor.

[8] Our holding on WHC's appeal obviates the need to consider the Watkinses' cross-appeal of the district court's ruling that the Plan itself could not be sued under an equitable estoppel theory.

869 F.2d 1215, 1221 (9th Cir. 1988). The award of attorney's fees and costs is a matter committed to the court's discretion. 29 U.S.C. § 1132(g)(1). In exercising that discretion, we consider the following criteria:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative legal merits of the parties' positions.

Oster, 869 F.2d at 1222 (internal quotation marks omitted).

We deny the Watkinses' request for attorney's fees. Of the factors listed in Oster, only the second cuts in favor of the request: it is undisputed that WHC can absorb the hit of a fee award.

The remaining factors either cut against the request or simply do no weigh heavily on either side of the balance. The district court specifically found that WHC did not act in bad faith. The deterrence effect of a fee award in this case would be minimal. The Watkinses brought this appeal to benefit only themselves. Finally, we have held adversely to the Watkinses on all theories they advanced.

AFFIRMED IN PART, REVERSED IN PART

Each side shall bear its own costs.

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Attorney for Plaintiff

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GLENN D. THESENVITZ; DONALD J. HEBERLEIN, JAMES E. BERWICK, DONALD E. PALMER, KENNETH L. WILSON, FERRIN K. WALKER and NORMA STARK, PR of the Estate of LAWRENCE STARK, Dec'd.,	)	NO.
Plaintiffs,	)	COMPLAINT FOR DAMAGES
vs.	)	
KAISER ENGINEERS HANFORD COMPANY, KAISER ENGINEERS RETIREMENT PLAN, and ADMINISTRATIVE COMMITTEE FOR THE KAISER ENGINEERS HANFORD RETIREMENT PLAN,	)	
Defendants.	)	

COMES NOW the plaintiffs above-named and for cause of action herein allege as

follows:

I.

Plaintiffs Thesenvitz, Stark, Heberlein, Berwick and Wilson are residents of Benton County, Washington. Plaintiff Palmer is a resident of Yakima County, Washington. Plaintiff Walker is a resident of Spokane County, Washington.

II.

Each of the plaintiffs, with the exception of plaintiff Norma Stark, formerly was employed by the J. A. Jones Company at the Hanford Nuclear Reservation. Each of the plaintiffs, with the exception of plaintiff Norma Stark, became employees of the Kaiser Engineers Hanford Company as of March 1, 1987, at the time when a "consolidation" of Department of Energy Contractors took place at the Hanford Nuclear Reservation. Each of the plaintiffs, with the exception of plaintiff Norma Stark,

thereafter was employed by the Kaiser Engineers Hanford Company until the time of his retirement. As of the current date each of the plaintiffs, with the exception of plaintiff Norma Stark, has retired from the employment of the Kaiser Engineers Hanford Company.

Plaintiff Norma Stark brings this action on behalf of the estate of her husband, Lawrence Stark, deceased, who was formerly employed by the J. A. Jones Company and thereafter became an employee of the Kaiser Engineers Hanford Company as of March 1, 1987, and who was so employed by the Kaiser Engineers Hanford Company until the time of his retirement.

III.

Defendant Kaiser Engineers Hanford Company is a Washington corporation authorized to transact business in the State of Washington and in fact was transacting business in the State of

Washington at all times material hereto.

IV.

Defendant Kaiser Engineers Hanford Retirement Plan is an employee pension plan within the meaning of 29 USC § 1002.

V.

The Kaiser Engineers Hanford Administrative Committee is the entity which administers the Kaiser Engineers Hanford Retirement Plan. The defendant Administrative Committee is the Plan Administrator for the Retirement Plan for the purposes of ERISA, 29 USC § 1001 et. seq. The Administrative Committee is made up of three individual members who are employed by and/or appointed by the Kaiser Engineers Hanford Company to administrate the Retirement Plan.

VI.

Prior to May of 1990, the plaintiffs, including Lawrence Stark, had all retired from active employment with

the Kaiser Engineers Hanford Company. Many of the plaintiffs were encouraged to retire as part of an "Early Retirement Program" that was offered by the Kaiser Engineers Hanford Company during 1988. At the time when they retired from active employment with the Kaiser Engineers Hanford Company, each of the plaintiffs herein was a participant in, and was entitled to receive benefits under, the Kaiser Engineers Hanford Retirement Plan, with the exception of plaintiff Stark, who is bringing this action on behalf of the estate of decedent, Lawrence Stark, who was a participant in the Plan prior to his death on April 28, 1991.

VII.

Prior to the time when each of the plaintiffs retired from active employment with the Kaiser Engineers Hanford Company, the defendants made specific representations to the plaintiffs as to

the amount of pension benefits that they would be entitled to receive under the Retirement Plan if they chose to retire at that time. That is, each plaintiff was informed by the defendants that he would receive pension benefits each month in a specific dollar amount after his retirement if he chose to receive his pension benefits in the form of future monthly payments. Based upon these representations by the defendants as to the amount of pension benefits that they would be entitled to receive if they retired, the plaintiffs did in fact choose to retire even though they were not obligated to do so at the time when they retired.

VIII.

Prior to retirement from active employment with the Kaiser Engineers Hanford Company, each plaintiff was given a number of options as to how they could

choose to receive their pension benefits. Two of these options were to receive these benefits either in the form of a series of future monthly payments which were to commence after retirement, or in the form of a one time lump sum payment that was to be paid at the time of retirement. Based upon the defendants' representations to the plaintiff as to the amount of pension benefits that they would receive if they chose to accept their pension benefits in the form of future monthly payments, and based upon the defendants' representations to the plaintiffs as to the amount of pension benefits that they would receive if they chose one of the other options concerning the receipt of benefits that was available to them, the plaintiffs all chose to receive their pension benefits in the form of future monthly payments.

IX.

After the plaintiffs had retired from active employment with Kaiser Engineers Hanford Company, each of them began receiving pension benefits from the defendants in the form of monthly payments. Initially, these monthly payments were in the amount that had been represented to the plaintiffs that they would be entitled to receive upon their retirement. The plaintiffs continued to receive pension benefits in this amount for a period of a minimum of 14 months.

X.

As a result of the defendants' above-described representations and actions regarding their pension benefits, each plaintiff herein substantially and detrimentally changed his financial status and/or his employment status in reliance upon the defendants' representations and actions regarding the plaintiffs' pension benefits by choosing

to retire at a time when such retirement was not mandatory, thereby foregoing the opportunity to earn substantial wages and benefits while remaining employed by the Kaiser Engineers Hanford Company, and by making significant purchases and other financial decisions which greatly affected their lifestyle and their ability to return to the workforce at a later date.

XI.

In May of 1990, after each one of the plaintiffs had been retired from active employment with the Kaiser Engineers Hanford Company and had been receiving pension benefits from the Retirement Plan for a significant period of time in the amount that had been promised to them, they received a letter from the Kaiser Engineers Hanford Company which stated that a "mistake" had been made when the pension benefits of the

plaintiffs had been calculated at the time of their retirement. The letter went on to state that, as a result of this mistake, the plaintiffs' pension benefits would be significantly reduced when they received their pension payments in future months. Since May of 1990, the defendants have in fact significantly reduced the monthly pension payments that are received by each one of the plaintiffs herein, thus significantly impacting the plaintiffs' monthly income and their ability to support themselves.

XII.

Upon being informed by the defendants that their monthly pension benefits were going to be significantly reduced, the plaintiffs herein protested this decision by following the claims procedure that is provided for in the summary plan description for the Kaiser Engineers Hanford Retirement Plan. The

plaintiffs have now exhausted their remedies under this claims procedure, and the defendants have continued to refuse to resume making monthly pension benefit payments to the plaintiffs in the amount that had been promised to the plaintiffs at the time of their retirement, or to reimburse the plaintiffs for the damages which they have suffered as a result of the significantly reduced pension benefits which they have been receiving since May of 1990.

XIII.

Only individuals such as the plaintiffs, who chose to receive their pension benefits in the form of future monthly payments have suffered a "reduction" in their pension benefits. Similarly situated individuals who chose to receive their retirement benefits in the form of a one time lump sum payment have not had their pension benefit

reduced in any manner.

XIV.

The defendants' conduct as described in Paragraphs I through XIII above violated ERISA, 29 USC § 1001 et. seq.; violated the terms of the Retirement Plan; constitutes an improper amendment of a pension plan, again, in violation of ERISA; and, under the principles of equitable estoppel, precludes the defendants from reducing the amount of pension benefits that the plaintiffs were promised that they would receive at the time of their retirement from active employment with the Kaiser Engineers Hanford Company.

WHEREFORE, based upon the foregoing, the plaintiffs pray the court for the following relief:

1. An order determining that the conduct of the defendants as described above violated ERISA, 29 USC § 1001;

2. An order determining that the conduct of the defendants as described above violated the terms of the controlling plan document for the Retirement Plan, and therefore, once again, violated ERISA;

3. An order determining that the defendants improperly amended the Retirement Plan in a manner so as to reduce the plaintiffs' pension benefits, thus, once again, violating ERISA;

4. An order determining that the defendants are equitably estopped by their representations and actions from reducing the amount of pension benefits that the plaintiffs were promised at the time of their retirement form the employment of the Kaiser Engineers Hanford Company that they would receive during their retirement;

5. An order determining that, for the foregoing reasons, the defendants

should be ordered to immediately resume making monthly pension payments to the plaintiffs in the amount that had been promised to them at the time of their retirement, and that the defendants should be ordered to reimburse the plaintiffs for any monetary losses which they have suffered as a result of the defendants' unlawful reduction of the plaintiffs' monthly pension benefits beginning in May of 1990;

6. An order that, in the alternative, the plaintiffs may choose to receive their pension benefits in the form of one of the other options that they had available to them at the time of their retirement.

7. Plaintiff Norma Stark, as Personal Representative of the Estate of Lawrence Stark, is seeking as relief the amount of money that decedent was underpaid in pension benefits between May

of 1990 and his death on April 28, 1991, or the opportunity to elect to receive benefits in another form;

8. That the trial of this matter be heard by a jury.

9. For such other and further relief as to the Court shall seem just and equitable in this instance.

DATED: This 27th day of June, 1991.

CRITCHLOW, WILLIAMS,
SCHUSTER & MALONE
Attorneys for Plaintiffs

By: _____
Alex J. Skalbania
WSBA #15412

APPENDIX I

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX J

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX K

29 U.S.C. § 1001

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of

their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing

anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting

standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit pans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to Protect interstate

commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

APPENDIX L

29 U.S.C. 1102(a)

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

APPENDIX M

29 U.S.C. § 1104

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like

character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversion requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section

407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

APPENDIX N

29 U.S.C. § 1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or

after he ceased to be a fiduciary.

APPENDIX O

29 U.S.C. § 1132

Civil enforcement.

(a) Persons empowered to bring a civil action. A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by a Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of

this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title to the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(d) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section

609(a)(2)(A) [29 USCS § 1169(a)(2)(A)]); or

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary

plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator of any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of

civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary, or any person referred to in § 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the

United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.